Supreme Court, U. S.
FILED
APR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL, *Petitioner*

v.

PEPSI COLA COMPANY, *Respondent*

On Petition For A Writ of Certiorari To The District of Columbia Court of Appeals

MEMORANDUM FOR RESPONDENT PEPSI COLA COMPANY IN OPPOSITION

EDWARD J. GORMAN, JR. ESQUIRE
4400 Jenifer Street, N.W.
Suite 355
Washington, D.C. 20015

Attorney for Respondent Pepsi Cola Company

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL, *Petitioner*

v.

PEPSI COLA COMPANY, *Respondent*

On Petition For A Writ of Certiorari To
The District of Columbia Court of Appeals

MEMORANDUM FOR RESPONDENT PEPSI COLA COMPANY IN OPPOSITION

PROCEEDINGS BELOW

The Petitioner herein, Henry J. Waddell (hereinafter Waddell) commenced a personal injury suit against the Pepsi Cola Company, (hereinafter Pepsi) alleging personal injuries as a result of an automobile accident on April 30, 1969. The facts of the accident were disputed (not stipulated to and incorporated into the Pre-Trial Order as alleged by Petitioner in his Statement Of The Case). Motions for directed verdict were denied and the case was given to the jury which returned a verdict in favor of Waddell on April 11, 1972.

Thereafter, Pepsi filed a Motion for New Trial and/or judgment N.O.V. Both Motions were denied by the trial court following which Pepsi timely noted an appeal.[1]

The argument to the Court of Appeals was based on the manner in which the accident occurred and injury was sustained. The Court of Appeals agreed with Pepsi that the trial court erred in submitting the case to the jury as Waddell's evidence respecting the cause of the accident and injury amounted to pure speculation. The jury verdict was reversed. The case was not remanded back to the trial court for any further proceedings. (See *Pepsi Cola Company* v. *Waddell,* 304 A.2d 630 (1973), Appendix 1).

No further action occurred in this case until three years thereafter when in 1976 Waddell had the case re-calendared for trial. Pepsi, through its counsel, advised the Assignment Commissioner that the case was improperly scheduled for trial (Appendix 2) and thereafter the case was removed.

Notwithstanding its removal, Waddell appeared in court on the date the case had been set (October 4, 1976) and sought to enter a default against Pepsi (Appendix 3). Thereafter, on December 17, 1976 Waddell attempted to schedule a hearing so as to establish damages by ex-parte proof (Appendix 4).

The default sought was not entered and thereafter, on March 23, 1977 Waddell requested the Clerk to

---

[1] While Waddell contended in a second appeal thereafter and in his Petition for Certiorari that no judgment was properly entered by the trial court and therefore the appeal was improper, such an argument was not raised during the appeal of Pepsi.

refer the case back to the trial judge for a "ruling" (Appendix 5). Thereafter an undated Order from the trial judge was received by counsel for Pepsi (Appendix 6) and following this Waddell noted an appeal.

Following notice of the appeal Pepsi filed a Motion to Dismiss, which Motion was subsequently granted by the District of Columbia Court of Appeals (Appendix 7). Waddell filed a Petition for Reconsideration and Rehearing En Banc which Petition was denied. (Appendix 8)

REASONS FOR DENYING PETITION

1. Waddell has had his day in court. His case was presented to a jury (albeit improperly) and a verdict was returned. However, the District of Columbia Court of Appeals ruled that the case should have not been presented to the jury and reversed the trial court's denial of the Motion for Directed Verdict made by Pepsi.

2. There was nothing thereafter for Waddell to do except to file a Petition for Writ of Certiorari which was not done. Waddell thus acquiesced in the Appellate decision.

3. The attempt to resurrect this case and to reschedule it for trial was in point of fact a nullity. Waddell had no basis for doing so and despite several attempts at legal maneuvering, he was unable to force the case back for a second trial.

4. The referral of the case to the trial judge and the issuance of the Order by the trial judge directing a verdict for Pepsi was also a nullity. The trial court had no authority to entertain the case or to issue any Order and the same is truly without any legal significance.

5. The appeal taken from the Order of the trial court is also a nullity. Waddell already had his opportunity to present his case in the first appeal. The Court of Appeals did not agree with him and felt that his evidence was lacking in several essential areas.

6. The series of legal attempts to reinstate this cause of action are without proper foundation and have succeeded in causing Pepsi to incur substantial additional expenses to defend against the present efforts of Waddell, none of which ever should have been incurred in light of the opinion of Judge Yeagley.

CONCLUSION

Waddell's Petition for a Writ of Certiorari is without foundation and is substantively unworthy of review. Accordingly, it should be denied.

Respectfully submitted,

EDWARD J. GORMAN, JR. ESQUIRE
4400 Jenifer Street, N.W.
Suite 355
Washington, D.C. 20015

Attorney for Respondent
Pepsi Cola Company

Dated: March —, 1978

APPENDIX

APPENDIX 1

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 6706

PEPSI COLA COMPANY, APPELLANT

v.

HENRY J. WADDELL, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued November 22, 1972 Decided May 15, 1973)

Austin F. Canfield, Jr., with whom *Richard W. Galiher* was on the brief, for appellant.

William A. Burleson for appellee.

Before Gallagher, Pair and Yeagley, Associate Judges.

YEAGLEY, *Associate Judge:* This appeal is from a jury verdict against appellant in the amount of $12,500 for injuries allegedly resulting from a collision between appellant's vehicle and the vehicle operated by appellee.

Appellant company urges on appeal primarily that the trial judge committed error in allowing the case to go to the jury.[1] It contends that the evidence produced at trial was so deficient in essentials as to require the jury to speculate as to how the accident occurred. Appellant argues that the testimony proffered by the appellee did not demonstrate a scintilla of evidence of negligence on the part of the appellant. After a review of the record we agree and accordingly reverse.

The evidence presented at trial accepted in the light most favorable to the appellee (plaintiff below) reveals that

---

[1] Appellant's motions for directed verdicts were denied by the trial court both at the conclusion of the appellee's case in chief (Tr. at 70-75) and at the conclusion of the entire case (Tr. at 113-15).

appellee was proceeding west on H Street, N.E., approaching the intersection with Seventh Street. H Street has two westbound lanes in addition to a westbound curb parking lane and one eastbound lane.

There are several differences in the testimony of the drivers of the car and truck as to precisely what occurred at this point. According to appellee, he proceeded through the intersection at Seventh Street in the center lane (the farthest left westbound lane) and passed appellant's truck which was double-parked just across the intersection in the westbound lane nearest to the parking lane. As appellee passed appellant's truck he heard a noise and thought he had been hit by a following car. He stopped his vehicle in the center lane just beyond the truck and exited his car on the passenger side to inspect the damage. He found some debris from a previous accident, and concluded his vehicle had not been hit. Appellee then proceeded to get back into his car through the passenger door. He said that as he opened the door it was hit in "the middle" by the appellant's truck, as it started to move in a westbound direction. The force was sufficient to cave in the door in a concave fashion severing one-half of appellee's right index finger. He did not testify as to where his finger was placed when the accident occurred. Neither did appellee tender any testimony as to what part of the truck hit the door, whether it was the bumper or the outside corner of the van. Nor does he contend that the door had been open for some time before it was hit, but rather it was struck as he opened it. It is impossible to arrive at a logical conclusion from the foregoing testimony as to what act of negligence caused the injury. In the course of this testimony the following exchange occurred:

> THE COURT: I suppose what the Court is concerned about is how did the truck manage to hit your finger without hitting you?

> THE WITNESS: It hit the door, sir. Just as I was going to get in—I hadn't got in the car, but it hit the door of my car.
>
> THE COURT: And your finger was between the truck and the door?
>
> THE WITNESS: No. It wasn't, sir.
>
> THE COURT: I'll leave it to you to explain it. I haven't got a clean picture of it. Mr. Canfield? [Tr. at 41.]

Whereupon cross-examination of the witness began.

Adding to the confusion, and left unexplained by the appellee, is his admission, when called as a witness for the defense, that his right rear door was also damaged in the accident, as reflected in his repair bill, and required three hours of labor to fix. Despite this testimony he also said at this point that there was only one impact, not two.

The incongruity of his entire testimony in view of the two damaged doors is highlighted by a part of his deposition which was read into the record as follows:

> "Question: Was any part of your body struck?
>
> Answer: Not one part. This is the amazing thing. I'm standing almost directly in front of the door.
>
> Question: Where was your right hand at that time?
>
> Answer: I just opened the door—and those doors are very heavy, sir, and to keep them from swinging back too far I caught it, and I opened it with this hand [indicating] and I know that it's heavy, and it was swinged back very hard. I put my hand up like this on the top of it to stop it from swinging back, swinging all the way back—" [Tr. at 96.]

The fact that two doors were damaged would seem to corroborate the testimony of the truck driver that there

were two impacts. The first when appellee's car got hung up on the truck's left rear bumper while trying to turn out and around the truck, and the second when the front door apparently was opened from the inside as the truck driver was proceeding a few feet forward in order to untangle the two vehicles and the left rear bumper of the truck struck the open door.

Appellant aptly contends that it was physically impossible for the accident to have happened as described by appellee. At oral argument, appellee's counsel, who also was trial counsel, upon being asked to enlighten the court as to how the accident occurred was not able to explain the occurrence.

As we stated in *Courtney v. Giant Food, Inc.*, D.C.App., 221 A.2d 92, 94 (1966):

> [A] jury should never be permitted to guess as to a material element of the case such as damages, negligence, or causation. See MacMaugh v. Baldwin, 99 U.S.App.D.C. 247, 239 F.2d 67 (1956); Reece v. Capital Transit Co., 97 U.S.App.D.C. 274, 230 F.2d 824 (1956); Jones v. District of Columbia, [D.C.Mun.App., 123 A.2d 364 (1956)] . . . .

The burden was on the appellee to establish a particular act of negligence on the part of appellant and that such act was the proximate cause of the injury.[2] This he has failed to do.

The question of law presented by the motions for a directed verdict "is not whether there is any evidence—a mere scintilla is not sufficient—but whether there is any upon which a jury could properly find a verdict for the party upon whom the onus of proof is imposed."[3] Appel-

[2] *Gunning v. Cooley*, 281 U.S. 90 (1930).

[3] *Baker v. D.C. Transit System, Inc.*, D.C.App., 248 A.2d 829, 831 (1969).

lee's strongest evidence, to which there is serious challenge regarding its admissibility, was appellee's testimony that he heard appellant's truck driver say he thought he could make it. It is not particularly important that this was denied by the truck driver for such a statement, without more, does not establish negligence nor does it explain in a causal fashion how appellee's finger was severed.

The evidence adduced at trial was not sufficient factually to permit a logical conclusion as to exactly what occurred and consequently it was insufficient to permit the submission of the case to the trier of fact.[4] When the evidence requires a jury to speculate as to negligenc or causation, a motion for a dircted verdict for defendent (appellant) must be granted.[5] Unfortunately, even when it is clear that the plaintiff was permanently injured, causation and negligence cannot be inferred from the mere fact of the injury.

The judgment of the trial court is

Reversed.

[4] *Id.; see also Gunning v. Cooley, supra.*

[5] *Baker v. D.C. Transit System, Inc., supra; Reece v. Capital Transit Co., supra; MacMaugh v. Baldwin, supra.*

APPENDIX 2

October 13, 1976

Mr. James H. Dawson
Interview & Judgment Officer
Superior Court of the District
of Columbia
440 - G Street, N.W.
Washington, D.C. 20001

Re: Henry J. Waddell v. Pepsi Cola Company
Civil Action No. 22207-70

Dear Mr. Dawson:

I am in receipt of a copy of a praecipe filed by Mr. Burleson in the above captioned matter. I am enclosing a photocopy thereof so that it will provide a ready reference.

The Clerk's Office should not receive this praecipe nor should any default be entered.

This case was tried more than two years ago and a judgment for the plaintiff was entered. The case was appealed by the defendant and the judgment was reversed outright. The case was not remanded back to the Superior Court for further trial. The case thus stood at a conclusion following the decision of the Court of Appeals, a copy of which I likewise enclose.

Mr. Burleson attempted to have the case set on the docket for trial, without my consent and shortly prior to the trial date, I contacted the assignment office and advised Mr. West of the decision of the Court of Appeals and the fact that it was inappropriate for this matter to be listed on the trial calendar. Mr. West advised that it was being removed from the trial calendar.

There was thus two reasons for no appearance on October 4, 1976. The first was the case was not properly on the

court docket and the second was that it had been removed after notification.

I would appreciate your advices that the praecipe seeking to enter the default has been rejected by the Court.

Sincerely,

AUSTIN F. CANFIELD, JR.

APPENDIX 3

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 5TH DAY OF OCTOBER, 1976

No. CA 22207-70

HENRY J. WADDELL, *Plaintiff*

vs.

PEPSI COLA COMPANY, *Defendant*

The Clerk of said Court will enter a default pursuant to Superior Court Civil Rule 55(a). The above-entitled action was set for trial on October 4, 1976, and on February 5, 1976, both parties received written notice to appear. On October 1, 1976, both parties again were notified to be present in the Office of the Assignment Commissioner on October 4, 1976. The Plaintiff and his counsel did appear; Defendant and Defendant's counsel did not appear, nor was Plaintiff's counsel contacted regarding their non-appearance.

/s/ WILLIAM A. BURLESON
WILLIAM A. BURLESON #135-277
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.

cc: AUSTIN CANFIELD, JR. ESQ.
Attorney for Defendant
4400 Jenifer Street, N.W.,
Washington, D.C.

APPENDIX 4

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 17TH DAY OF DECEMBER, 1976

No. CA #22207-70

HENRY J. WADDELL, *Plaintiff*

vs.

PEPSI COLA COMPANY, *Defendant*

The Clerk of said Court will note plaintiff's application for judgment by default subject to ex parte proof of damages. Plaintiff requests the Clerk to schedule the above hearing pursuant to Superior Court Civil Rule 55 b(2).

WILLIAM A. BURLESON #135-277
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.

cc: AUSTIN CANFIELD, JR., ESQ.
Attorney for Defendant
4400 Jenifer Street, N.W.,
Washington, D.C.

APPENDIX 5

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE 23RD DAY OF MARCH, 1977

No. 22207-70

HENRY J. WADDELL

vs.

PEPSI COLA CO.

The Clerk of said Court will refer the above case to Judge Ketcham, for ruling as requested in Plaintiff's letter dated January 25, 1977, filed herein. Matters previously brought before Civil Calendar continue —⁇—— March 23, 1977.

/s/ WILLIAM A. BURLESON
WILLIAM A. BURLESON
Attorney for Plaintiff
1000 Pennsylvania Avenue, S.E.,
Washington, D.C.
LI 4-4111

cc: AUSTIN CANFIELD, JR.
Attorney for Defendant
4400 Jennifer Street, N.W.
Washington, D.C.

APPENDIX 6

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA:

CIVIL DIVISION

CA No. 22207-70

HENRY J. WADDELL, *Plaintiff*

v.

PEPSI COLA COMPANY, *Defendant*

Order

In its review of the record of this case on appeal the District of Columbia Court of Appeals agreed with the defendant/appellant's contention that the plaintiff/appellee did not meet his burden of producing sufficient evidence to establish an act of negligence on the part of the defendant and to show that such act was the proximate cause of plaintiff's injury.

The Appeals Court concluded saying:

> "The evidence adduced at trial was not sufficient factually to permit a logical conclusion as to exactly what occurred and consequently it was insufficient to permit the submission of the case to the trier of fact. When the evidence requires a jury to speculate as to negligence or causation, a motion for a directed verdict must be granted."

Accordingly, the Court has no choice but to follow the mandate of the District of Columbia Court of Appeals and direct a verdict for the defendant, Pepsi Cola Company.

/s/ ORMAN W. KETCHAM
ORMAN W. KETCHAM, *Associate Judge*

APPENDIX 7

DISTRICT OF COLUMBIA COURT OF APPEALS

Case No. 12230

Henry J. Waddell, *Appellant*

vs.

Pepsi Cola Company, *Appellee*

Motion to Dismiss or In the Alternative for Summary Affirmance

Comes now the Defendant, Pepsi Cola Company, by and through its counsel, and moves this Court to dismiss the appeal filed herein, or in the alternative, to grant Summary Affirmance to it along with costs and attorney's fees should the Court find the same appropriate and as reasons therefor refers the Court to the Points and Authorities attached hereto and prayed to be read as a part hereof.

Gorman and Canfield

By /s/ .....
Austin F. Canfield, Jr.
Attorneys for Appellee
4400 Jenifer Street, N. W. #355
Washington, D. C. 20014
244-5695

(Caption Omitted in Printing)

Points and Authorities

Rule 42(c).

This is the second appeal in this case. This Court rendered its initial decision on May 15, 1973 in Pepsi Cola Company vs. Waddell, 304 A.2d 630, reversing a jury verdict against Pepsi Cola Company. The opinion concluded that the Plaintiff, Waddell, failed to meet essential elements of proof during the course of the trial. Lacking that proof, the Plaintiff had no case to present to the jury.

In 1976, counsel for Waddell requested and received a trial date from the Assignment Office whereupon it was the intention to retry the issues of Civil Action No. 22207-70. Thereafter, the Assignment Office was notified that the original case had been reversed outright and was not remanded back for a new trial. The case was thereupon removed from the trial calendar.

Thereafter, on the trial date of October 4th, notwithstanding the fact that the case had been removed from the trial calendar, the Plaintiff and his attorney appeared in Court prepared to go forward. A praecipe was then filed seeking a default to be entered against Pepsi Cola in light of the fact that no representative acting on its behalf was present. A copy of the praecipe was forwarded to this counsel and, thereafter, a letter was sent to the Judgment Officer suggesting that the praecipe was inappropriate and should not be received.

Thereafter, Waddell, through his counsel, filed an application for Judgment by Default subject to ex parte proof of damages and requesting a hearing thereon be set. Upon receipt of that praecipe, a letter was sent by this counsel to counsel for Plaintiff suggesting that it was inappropriate to attempt to schedule this case for another trial date in that the Court of Appeals had already ruled and the matter had been terminated by the decision. In responding, counsel advised this counsel that he would nevertheless continue to seek the default.

Thereafter, on March 23, 1977, counsel for Plaintiff, by praecipe, requested the case be referred to Judge Ketcham for a ruling. In an undated Order, Judge Ketcham ruled that he had no choice but to follow the mandates of the District of Columbia Court of Appeals. Thereafter, on April 8, 1977, Plaintiff noted this present appeal.

There is no merit to the present appeal. This court previously decided that Plaintiff failed to meet his burden of

proof and that Pepsi Cola Company was entitled to a Directed Verdict. The efforts to revitalize this case are both inappropriate and improper. They have cost Pepsi Cola Company additional time and money in seeking a final conclusion of this case. Should the Court feel it appropriate, counsel will be happy to file a statement as to the time of legal services involved which include not only those referred to above, but additional correspondence with the company itself.

This matter should be brought to a speedy and prompt conclusion. The appeal being without merit, it should be dismissed outright or in the alternative, Appellee should be granted Summary Affirmance.

GORMAN AND CANFIELD

By .....
AUSTIN F. CANFIELD, JR.
4400 Jenifer Street, N. W. #355
Attorney for Appellee
Washington, D. C. 20014
244-5695

APPENDIX 8

Civil Action No. 22207-70

No. 12230

HENRY J. WADDELL, *Appellate*

vs.

PEPSI COLA COMPANY, *Appellee*

Petition for Reconsideration and Hearing En Banc

Appellant lost part of his right index finger in an automobile collision on April 30, 1969. A jury awarded him $12,500.00 on April 11, 1972.

No judgment was entered on the jury verdict. Defendant filed a motion for a new trial and/or a judgment notwithstanding the verdict. Defendant's motion was denied and he appealed. The Appellate Court entered a judgment reversing the "judgment" of the trial court.

It was maintained that the judgment of the Appellate Court was null and void because there had been presented no appeal from a judgment of record in the court below. The case was placed on the ready calendar and was set for trial on October 4, 1976. On the date set for trial, defendant did not appear and the case was removed from that days trial calendar. The plaintiff made application to the civil motions court to enter a judgment for the plaintiff on the jury verdict or enter a default in favor of the plaintiff, or return the case to the trial calendar. An order was entered directing a verdict for the defendant, and the plaintiff appealed. The Appellate Court dismissed plaintiff's appeal.

The dismissal by the District of Columbia Court of Appeals of Appellant's appeal was done in violation of Appellant Waddell's constitutional rights. Appellant was denied due process of law and equal treatment of the law.

It is submitted that an appeal taken from a jurys verdict or decision of the court before judgment has been entered is premature and must be dismissed; further, a notation of a jury verdict is not entry of judgment and is not appealable, nor is the denial of a motion to set aside the verdict as against the weight of evidence appealable.

Some courts have disregarded the clear provision of rule (79A) that "every judgment must be set forth on a separate document and must be entered on the docket" and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. See *U.S.* v. *Indrelunas 411 U.S. 916, 93, Supreme Court Reporter 1562; also Wright and Miller, Federal Practice and Procedure, Section 2781-2800.*

Respectfully Submitted,

/s/ William A. Burleson
William A. Burleson #135-277
Attorney for Appellant